

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Nationwide Programmatic Agreement)	WT Docket No. 03-128
Regarding the Section 106 National)	
Historic Preservation Act Review Process)	
)	

Comments of Crown Castle USA, Inc.

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Crown Castle USA, Inc. ("Crown Castle"),¹ submits these comments in this Notice of Proposed Rulemaking ("NPRM")² regarding the Section 106 National Historic Preservation Act Review Process ("Draft NPA").

Introduction and Summary

Crown Castle owns and manages over 10,000 communications towers in the United States that provide a platform for the antennas and equipment used by providers and operators of commercial wireless and public safety communications services. Throughout its history, the Company has participated actively in the Section 106 process for new tower construction and for collocation of communications equipment and has implemented procedures to ensure that its actions meet the full range of requirements under the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), and the FCC environmental

¹ Crown Castle USA, Inc. is the domestic United States operating division of Houston, Texas-based Crown Castle International Corp. Crown Castle International Corp. develops, owns, and manages shared infrastructure facilities such as towers and rooftops for wireless telecommunications and broadcast services in the United States, the United Kingdom, and Australia. In addition, in the UK, Crown Castle owns and operates the transmission network that broadcasts the television signal of the BBC (British Broadcasting Corporation) and other content providers. Crown Castle belongs to PCIA, the Wireless Infrastructure Association, and fully concurs with the comments that PCIA has filed in this NPRM.

regulations at 47 C.F.R. 1.1301-1.319. As part of its compliance efforts, Crown Castle has also given considerable attention to developing and implementing company procedures for consultation with Indian tribes with historical or aboriginal ties to areas where the company is constructing towers or has towers where collocation projects may affect resources of cultural or religious significance to a tribe.

Crown Castle believes that a carefully drafted and well-reasoned Nationwide Programmatic Agreement (“NPA”) will be of considerable value to all participants in the Section 106 process, including Indian tribes and Native Hawaiian organizations (NHOs). Crown Castle believes, however, that any potential benefit that the NPA may provide for all Section 106 participants would be lost if several provisions in the Draft NPA under consideration are adopted in the final NPA. These provisions are summarized below and addressed more fully in the body of these comments.

- Tower modifications and associated excavations that are not related to a collocation and do not increase the size of the tower are **not** Undertakings for purposes of Section 106.

While the Draft NPA properly states that service and maintenance of antennas and equipment are not Undertakings for the purpose of Section 106, the Draft NPA improperly categorizes tower modifications and associated excavations that are not related to a collocation and do not substantially increase the size of the tower as Undertakings. Even though the Draft NPA excludes such modifications and excavations from Section 106 review, such actions do not meet the statutory definition of Undertaking under the NHPA and the ACHP regulations and must not be categorized as Undertakings.

² June 9, 2003 News Release – “FCC Seeks Comments on Programmatic Agreement Intended to Streamline the

- The procedures for tribal consultation as originally proposed by the Telecommunications Working Group fully satisfy the requirements of the statute.

The procedures in the Draft NPA for consultation with Indian tribes and NHOs for considering potential effects to properties of cultural and religious significance to them are consistent with the NHPA and the ACHP regulations. These procedures also fully preserve a tribe's or NHO's right to engage in government-to-government consultation with the FCC.

- The alternate procedures for tribal consultation proposed by the Navajo Nation and the United South and Eastern Tribes ("USET") are misguided and their adoption would interject burdensome and unnecessary steps in the Section 106 process.

The USET plan would accord Indian tribes with regulatory authority not authorized by any Federal statute. In addition, the USET plan, if adopted, would also create circumstances that could jeopardize the integrity of the Section 106 process. The Navajo Nation proposal would unnecessarily encumber the Section 106 review process by subjecting "excluded" Undertakings to tribal consultation, even though such undertakings have been categorically determined not to adversely affect historic properties. As a result, wireless service providers would be burdened by an additional layer of regulatory procedures in situations where there is no potential to adversely affect resources of cultural or religious significance to Indian tribes or NHOs.

I. The Commission must clearly identify the Undertakings subject to the NPA.

The Draft NPA states that it applies to "federal Undertakings as determined by the Commission."³ The Draft NPA also states that the NPA "streamlines and tailors the Section 106 review process for ... Undertakings involving the construction and modification of Facilities."⁴ Notwithstanding the implication that the NPA only applies to the construction of new towers and the installation of certain antennas not excluded by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (the "Collocation Agreement"), Attachment 2 to the Draft NPA lists activities and services, including various authorizations for wireless services as "covered by" the NPA. Moreover, Attachment 2 states that it is "illustrative and is not exclusive." Unless the FCC clearly defines those activities that are considered Undertakings for the purposes of the NPA, the resulting confusion will frustrate all participants in the Section 106 process.

II. Activities that are not specifically associated with the issuance of an FCC license, permit, or approval are not Undertakings.

In Section I.B. of the Draft NPA, the FCC provides useful context about what activities are not Undertakings. Section I.B states that "[m]aintenance and servicing of Towers, Antennas, and associated equipment are not deemed to be Undertakings subject to Section 106 review."⁵ This approach is clearly consistent with the NHPA. Section 106 of the NHPA specifies that any Federal agency, "having the authority to license any Undertaking shall, prior to the approval of the expenditure of any Federal funds ... or prior

³ NPRM, Section I.B. at A-4.

⁴ *Id.*

to the issuance of any license, ... take into account the effect of the Undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”⁶ (emphasis added)

The ACHP regulations expressly define "Undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency."⁷

The requirement that Undertakings be associated with a license, permit or approval is at odds with the Draft NPA exclusion for the "[m]odification of a tower and any associated excavation that does not involve a collocation and does not substantially increase the size of the existing tower, as defined in the Collocation Agreement,"⁸ (hereinafter referred to as "Exclusion 1"). Modifications at tower sites that do not involve a collocation and do not substantially increase the size of the existing tower do not require an FCC license, permit or approval and are not Undertakings. Therefore, such activities do not need to be expressly excluded from Section 106 review and should not be listed as an exclusion in the NPA. In addition, as indicated previously, categorizing an action that does not require a license or permit (and is not at least partly Federally funded) as an Undertaking will unnecessarily confuse Section 106 participants about what is and what is not an Undertaking.

⁵ NPRM, Section I.B at A-4.

⁶ 16 U.S.C. 470(f).

⁷ 36 C.F.R. § 800.16(y).

⁸ NPRM, Section I.B. at A-8.

If this exclusion is retained in the NPA, it could unintentionally expand the range of actions that are considered FCC Undertakings. For example, given how broadly “Tower” is defined in the Draft NPA,⁹ many common and frequently occurring activities that are not related to the issuance of an FCC permit, license or approval could be inappropriately classified as Undertakings. For example, activities such as constructing a new fence around a tower site, improving or extending an access road, planting new shrubs or making landscape improvements, or installing standard equipment such as air conditioners or back-up power generators could all be considered Undertakings. Such determinations would essentially be inconsistent with the statement in the NPA that maintenance and servicing of tower, antennas, and associated equipment are not deemed Undertakings subject to Section 106 review.

In practical terms, if Undertakings that are excluded from Section 106 review under the NPA were subject to review by Indian tribes and NHOs, as they would be if the language proposed by the Navajo Nation in III.B. is adopted, inconsequential and routine actions that have no potential to affect historic resources would become subject to regulatory scrutiny. Instead of streamlining the Section 106 process, the NPA would substantially increase the regulatory burden on applicants and FCC licensees.

More importantly, these types of routine tower activities, which are not associated with a collocation, are not subject to the Commission’s license, permit, or approval processes and are outside the scope of the Commission’s statutory authority to regulate. As currently drafted, the exclusion of the activities in III.A.1. is *ultra vires* and ripe for judicial review.

⁹ “Tower: Any structure built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna as defined herein.” (II.A.12. of the Draft NPA.)

Crown Castle urges the Commission to delete Exclusion 1 and to add language to Section I.B. stating that modifications and associated excavations that do not substantially increase the size of the tower are not Undertakings.

III. The procedures set forth in “Alternative A” satisfy every requirement under the National Historic Preservation Act (NHPA)¹⁰ and the Advisory Council (ACHP) regulations¹¹ for tribal consultation of covered Undertakings off tribal lands.

Tribal Consultation “Alternative A” would establish a comprehensive set of requirements with which the FCC and applicants would need to abide when covered Undertakings are planned off tribal lands. “Alternative A” would also preserve every opportunity contemplated in the NHPA and the ACHP regulations for Indian tribes to participate in the Section 106 process.

A. “Alternative A” is not an “unlawful delegation” of the Commission’s consultation obligations to non-governmental entities.

The ACHP regulations state, “[t]he agency official (FCC) may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official.”¹² (emphasis added) Further, the ACHP rules are clear that “[f]ederal agencies that

¹⁰ Section 101(d)(6)(A & (B) of the National Historic Preservation Act requires a Federal agency, in carrying out its Section 106 obligations, to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties of religious and cultural importance that are or may be eligible for inclusion in the National Register. [16 U.S.C. § 470(d)(6)(A)&(B)]

¹¹ 36 C.F.R. Part 800

¹² 36 C.F.R. 800.2(c)(4)

provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.”¹³

While “Alternative A” would allow an applicant to initiate consultation with Indian tribes and NHOs, it does not grant, bestow, or delegate any ability or authority to the applicant to make any decision or to take any action that would be contrary to the wishes or findings of an Indian tribe or NHO. As such, the FCC would remain fully responsible for the government-to-government relationships with Indian tribes, consistent with the FCC’s statutory requirement to consult with Indian tribes when an Undertaking may affect tribal cultural or religious resources that are determined eligible for the National Register.¹⁴

B. “Alternative A” will ensure that potential effects of covered Undertakings on properties with religious or cultural significance to Indian tribes are considered and appropriately addressed.

The ACHP regulations place a substantial burden on Federal agencies to consult with Indian tribes when an agency Undertaking may affect cultural or religious resources.

Section 800.2 (c)(2)(ii)(A) states:

The Agency official shall ensure that consultation in the Section 106 process provides the Indian tribe or NHO a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.

“Alternative A” sets forth a comprehensive approach that satisfies every agency requirement set forth in the ACHP regulations. Specifically, section IV.D. of the NPA requires applicants to use reasonable and good faith efforts to identify tribes that may attach significance to potentially affected properties. Sections IV.E and F require applicants to

¹³ *Ibid.*

notify tribes early in the planning process and to invite their participation as consulting parties, including providing tribes with an opportunity to identify cultural or religious resources that may be affected by a proposed Undertaking. Sections G. and H. require applicants to accord tribes who have expressed interest in or concern about a project with consulting party status and provide them with the necessary information about the project to allow the tribe to make an assessment of the effects of the Undertaking and to articulate those findings to the applicant, the FCC, or both. Section I. forbids an applicant from proceeding with construction if a tribe or NHO believes that any adverse effects remains unresolved unless it receives specific authorization from the FCC.

C. “Alternative A” preserves a Tribe’s ability to address any issues related to a covered Undertaking in a government-to-government context.

The approach set forth in “Alternative A” to ensure that the FCC meets its obligations for government-to-government consultation is entirely consistent with both the statute and the enabling regulations. In the “Alternative A” proposal, applicants would be required to contact tribes and NHOs in writing early in the planning process and that the communications must explain that the tribe or NHO has the right to conduct government-to-government consultation with the FCC. Additionally, applicants must immediately inform the FCC if a tribe requests government-to-government consultation. Under “Alternative A,” applicants would also have no authority to proceed with a project without FCC authorization if a tribe or NHO has objections or concerns.

The “Alternative A” formula encourages applicants and tribes to work together to make sure that covered Undertakings do not adversely affect properties with cultural or religious significance to tribes and a tribe always retains the right to discuss or negotiate

¹⁴ Section 101(d)(6)(A) & (B) of the National Historic Preservation Act codified at 16 U.S.C. §470(d)(6)(A)&(B)

with the FCC on a government-to-government basis. Under no condition, could the FCC abscond from its obligation to take responsibility for any covered FCC Undertaking.

Crown Castle supports Alternative A and asks the FCC to include Alternative A in the final NPA.

IV. Tribal Consultation “Alternative B” (the USET proposal) distorts the respective responsibilities of the Agency official (FCC) and other consulting parties in the Section 106 process.

A. “Alternative B” would impose impractical administrative requirements unnecessary to the fulfillment of the FCC's Section 106 obligations for tribal consultation.

The “Alternative B” proposal provides two options for tribal consultation. Under the first option, the FCC would be required to handle all facets of communications and negotiations with tribes and NHOs for each covered Undertaking. The logistical issues associated with this option would be overwhelming. The FCC would probably have to add hundreds of staff to manage the magnitude of consultations for each Undertaking with each Indian tribe or NHO.

In the second option, the applicant would be required to secure a “letter of certification” from each Indian tribe. It has been Crown Castle's experience that many Indian tribes do not respond to invitations to consult on proposed Undertakings. It would be logical to assume that these tribes would not be willing to provide a letter of certification, even if there was no likelihood of adverse effects on tribal cultural or religious resources. In such circumstances, the applicant would have no recourse except to seek FCC intervention. In cases where the applicant has identified multiple tribes who should be contacted for a particular Undertaking, the unwillingness of just one tribe to respond could indefinitely

delay the conclusion of the Section 106 review. In such cases, this delay would be due to factors that have nothing to do with whether historic or tribal resources would be affected by the proposed Undertaking.

Conversely, under “Alternative A,” which was developed by the Telecommunication Working Group (including tribal representatives), the applicant would be required to make extensive efforts to identify and notify tribes and NHOs of the proposed Undertaking and invite their participation in consultation. With this process, tribes and NHOs would have every opportunity to consult and if necessary, participate in the resolution of adverse effects. At the tribe’s discretion, the consultation could be on a government-to-government basis with the FCC and in all cases, the FCC would remain fully responsible for all aspects of Section 106 for tribal considerations.

B. “Alternative B” improperly accords tribes with the authority to issue regulatory “approvals” and “denials” for Federal agency Undertakings.

In the Section 106 process, the Federal agency has the responsibility for considering the effects of its Undertakings on historic resources, including those of cultural and religious significance to Indian tribes, and to provide the ACHP with a reasonable opportunity to comment.¹⁵ The Federal agency also has the responsibility to consult with tribes about the potential effects to properties of religious and cultural importance to the tribes.¹⁶ Neither the NHPA nor the ACHP rules accord Indian tribes with authority or responsibility to make a final decision regarding a determination of effect in the Section 106 process off tribal lands, as defined under the NHPA.

¹⁵ See 16 U.S.C §470(f)

¹⁶ See 16 U.S.C. §470(d)(6)(A)&(B)

The USET proposal, however, would actually ascribe to Indian tribes regulatory powers not contemplated in the statute or the ACHP rules. For instance, under the second option of the USET proposal (paragraph IV.C.),¹⁷ the FCC would cede much of its Section 106 responsibility to Indian tribes, including its obligations for identifying historic resources, applying the criteria of adverse effects, and mitigating or resolving potential adverse effects. Such abrogation by the FCC of its Section 106 responsibilities could unduly compromise an equitable outcome for other consulting parties and the applicant, especially if the “certification” described in the USET proposal carries the force of an unassailable regulatory decision. Such a process, even if sanctioned in a programmatic agreement, would be inconsistent with a tribe’s role as a “consulting party” in the Section 106 process.

The proposed reliance in the USET plan on letters of “certification” that carry an imprimatur of regulatory sanction or approval is not consistent with the NHPA or the ACHP regulations. This in no way, however, diminishes the need for an applicant who is initiating or engaging in consultation with Indian tribes and NHOs to document and retain copies of all correspondence with tribes or NHOs. Applicants and the FCC do have a burden to show that reasonable and good faith efforts have been taken to identify tribes and invite their participation in the Section 106 process. Written communications as well as records of verbal communications from tribes about the identity and significance of historic properties of cultural and religious significance to the tribe (as detailed in Part 800.4)¹⁸ are

¹⁷ In the USET proposal, in all cases where the FCC does not consult directly with a Indian tribe, the agency’s Section 106 obligations could not be satisfied until the applicant would secure an express approval from the tribe in the form of a “letter of certification.”

¹⁸ 36 C.F.R. 800.4(a)(4) states the responsibility of the agency official to “gather information from any Indian tribe or Native Hawaiian organization ... to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register. ...”

critically important in documenting that potential effects on historic tribal resources have been appropriately considered.

C. The procedures proposed under “Alternative B” may lead to abuse of the Section 106 process.

If adopted, the USET proposal would create considerable confusion about the role and authority of Indian tribes with regard to Undertakings off tribal lands and this confusion could allow the Section 106 process to be manipulated in ways that could jeopardize its integrity.

Crown Castle believes that its experience working with one USET tribe may be instructive because this tribe’s procedures for Section 106 review closely resemble those in the USET proposal. For instance, when contacted by an applicant concerning a proposed Undertaking (e.g., construction of a communications tower), this tribe responds with a letter that outlines the tribe’s requirements for reviewing the proposed Undertaking and the method and conditions that would apply should the tribe approve the Undertaking.

Some portions of the instructions are appropriate and consistent with the ACHP rules. For example, the tribe requests all pertinent necessary information about the Undertaking.

Other demands or conditions made by the tribe, however, are not codified in or supported by the NHPA or the ACHP rules. For example, the tribe requires payment of a \$300 fee (plus travel expenses if necessary) for the review of an Undertaking. Once the tribe is satisfied that the project will not affect tribal resources, it sends the applicant a Memorandum of Understanding (MOA) and indicates that the approval will not be complete unless the applicant signs the MOU and indicates it will abide by all its terms. However, the MOU is a one-sided document that assigns new obligations to the applicants.

For instance, by signing the MOU, the applicant would be agreeing to submit all future collocations at the facility for tribal approval. This requirement ignores the 2001 National Programmatic Agreement on Collocation, which exempts collocations that do not substantially increase the size of the tower from Section 106 review. The FCC should expect that if “Alternative B” is adopted, some tribes may assume such regulatory authority to which they are not entitled. Based on these reasons, Crown Castle urges the FCC to reject Alternative B in the final NPA.

V. Section III.B. (the Navajo Nation’s proposal) is unwarranted because the FCC has determined that the specific exemptions in the NPA are activities that will not affect historic properties.

One of the express objectives of the programmatic agreement is to streamline the Section 106 process, which the FCC has indicated is “unnecessarily burdensome and complex for all parties.”¹⁹ In deliberations over many months, the Telecommunications Working Group identified a series of discrete actions that qualify as agency Undertakings that do not have the potential to cause effects on historic resources. In the proposed NPA, these actions would be excluded from Section 106 review (Section III.).

The activities identified in Section III. all²⁰ involve narrowly defined situations where the Undertaking would occur at locations where the ground has already been disturbed, which ensures that potential archeological or funerary objects would not be affected, or where any visual effect would be minimal due to the industrial or commercial nature of the immediate environment. Given the overwhelming likelihood that historic resources will not be affected by

¹⁹ NPRM at 1.

any of the activities proposed for exclusion, there is no supportable rationale for limiting these exclusions by bifurcating the Section 106 review and making procedural distinctions between impacts to historic resources that are of tribal significance and those that are not.

Aside from the practical considerations, the ACHP rules establish clear procedures for developing programmatic agreements in conjunction with the ACHP, NCSHPO, Indian tribes, and the public that exempt specific categories of actions that would not affect historic resources. Section 800.14(b)(1) provides for programmatic agreements that may be used, “[w]hen effects on historic properties are similar, repetitive or are multi-State or regional in scope.”²¹ Section 800.14(b)(1) also provides for establishing “exempted categories” where the actions would normally qualify as Undertakings and, “[t]he potential effects of the Undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and exemption of the program or category is consistent with the purposes of the Act.”²²

In developing this Draft NPA, the FCC has met its substantial burden under the ACHP rules to consult with the ACHP, SHPOs, the public, and Indian tribes and NHOs (consultation with tribes must be on a government-to-government basis²³). The proposed exclusions meet the Section 800.14(b)(1) requirements for establishing exempt categories. Accordingly, the Navajo Nation proposal limiting the application of the proposed exemptions has no merit and must be rejected by the Commission.

²⁰ Crown Castle has provided comments *supra* that Exclusion 1 is not an Undertaking and therefore, does not require Section 106 review. Accordingly, “all” in this context refers to the remaining exclusions, currently identified as III.B.2-6, NPRM at A-8 to A-9.

²¹ 36 C.F.R. 800.14(b)(1)

²² *Ibid.*

²³ 36 C.F.R. 800.14(f)(1)

Conclusion

For the foregoing reasons, the FCC must clarify that tower modifications that are not related to collocations and do not substantially increase the size of a tower are not Undertakings under the meaning of Section 106. In addition, the FCC should adopt the Telecommunication Working Group (Alternative A) language for consultation with Indian tribes and NHOs, and reject the Navaho Nation proposal.

Respectfully submitted,

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